SUPREME COURT, U.S.
FILED
JOHN F. DAVIS, CLERK

No. 216.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

REAL ESTATE CORPORATION, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF OF PETITIONER TO RESPONDENT'S "MEMORANDUM."

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I.

PRELIMINARY STATEMENT.

Under the provisions of Rule 24, respondent had the right to file an opposing brief to petitioner's brief for certiorari disclosing any matter or ground why the cause should not be reviewed by the Court, and respondent has filed a "Memorandum". Petitioner now avails itself of the opportunity provided by Rule 24 to reply to the "Memorandum".

II.

ARGUMENT.

A.

Respondent Does Not Challenge All of the Reasons Advanced for Granting Certiorari, but Only Part of Them.

Standing unchallenged by respondent are the following reasons advanced by petitioner for granting the writ:

(a) Respondent does not challenge the statement that it is important to investors and others to know whether the liquidation of investments under the circumstances of this case deprives them of the benefit of the capital gains provisions of the Internal Revenue Code, and this question has not been decided by this Court.

(b) Respondent does not challenge the statement advanced by petitioner that the Court of Appeals applied erroneous standards for decision when measured by the standards applied by this Court, and when measured by the standards prescribed by the controlling statute.

(c) Respondent does not challenge the statement advanced by petitioner that the issue presented raises an important question of federal law which has not been decided by this Court either under the Internal Revenue Code of 1939 or the Internal Revenue Code of 1954.

B.

Refutation of Respondent's Reasons Advanced for Denial of Petition for Certiorari.

In respondent's "Memorandum" in opposition to the granting of the petition for certiorari, it is indeed significant that only three grounds are advanced by the respondent—and they are:

(a) That the trial court's decisions should be affirmed unless "clearly erroneous".

(b) That whether or not a correct result was reached in this case on its particular facts is not a question for this Court.

(c) That the principles applied by the Court of Appeals are not in conflict with those followed by other Courts of Appeals.

It is on these grounds that respondent argues the petition for certiorari should be denied. We shall demonstrate the invalidity of those grounds.

(a) The "Clearly Erroneous" Rule Does Not Apply.

The main prop on which the Government leans in opposing the granting of the writ is the first reason advanced, that findings of fact are binding unless "clearly erroneous" under Rule 52(a) of the Federal Rules of Civil Procedure.

But here there was no conflict in the testimony or evidence and, paraphrasing the language of Mr. Justice Cardozo[1], the prop on which the Government leans is a broken reed, for this Court has ruled:

> "There is no significant dispute as to the b sic facts pertinent to the decision. We are thus not confronted here with the provision of Fed. Rules Civ. Proc., 52(a), that findings of fact shall not be set aside unless clearly erroneous".[2]

Since there was no dispute as to the facts, it necessarily and logically follows that there can be no applica-

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1. *Shepard* v. *United States*, 290 U.S. 96, 99; 78 L. Ed. 196, 199.

2. *U. S.* v. *DuPont DeNemours & Co.*, 353 U.S. 586, 598; 1 L. Ed.2d 1057, 1070.

tion of the "clearly erroneous" rule, contrary to the argument advanced by the respondent.

In an unsuccessful attempt to invoke the aid of the "clearly erroneous" rule, the respondent inaccurately asserts that:

> "The question is whether the taxpayer-corporation's activities in purchasing unimproved real estate lots at tax sales and selling them constituted a 'business'."

The respondent then dons syllogistic seven league boots to reach the unwarranted conclusion—a non sequitur—that petitioner's buying and selling activities for investment purposes became another business—and that the term "a business"—standing alone—is the equivalent of the governing statutory prerequisite for exclusion of gains from the capital gains provision. But the controlling statute prescribes a different criterion—it is

> "Property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business". (26 U.S.C., 1952 ed., Sec. 117)

(b) Whether a Correct Result Was Reached Is a Question for This Court When on the Entire Evidence, a Mistake Has Been Made.

Fallacious also is the premise advanced by respondent that

> "Whether, on its particular facts the correct result was reached is not a question for this Court * * *".

To the contrary, where there is no controversy in the facts, the question then becomes one purely of law and respondent apparently ignores the decision of this Court in *United States* v. *United States Gypsum Co.*,[3] where this Court said, noting the "clearly erroneous" rule,

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3. 333 U.S. 364, 395; 92 L. Ed. 746, 766.

> "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made."

In another tax case, contrary to its ruling here, the Tenth Circuit Court of Appeals followed that rule, as illustrated by the following quotation from *Cravens v. Commissioner of Internal Revenue*[4]:

> "Here the basic facts are not in controversy • • • A consideration of the nebulous distinctions between findings of fact and conclusions of law is not helpful. There are presented no conflicts of evidence or inference. We must take the record and determine whether a mistake has been made."

(c) The Principles Applied by the Tenth Circuit Court of Appeals Are in Conflict with Principles Applied by Other Courts of Appeals.

The third and final reason advanced by respondent for denial of the petition is that the principles applied by the Tenth Circuit Court of Appeals are not in conflict with those followed by the other courts of appeals. The conflicts were pointed out in the petition for the writ (pp. 8, 9).

But the decision of the Tenth Circuit Court of Appeals conflicts not only with the decisions of other courts of appeals on the same question, but also conflicts with its own decision in *Victory Housing No. 2* v. *Commissioner of Internal Revenue*[5]. It also conflicts with at least four of the eleven cases cited in footnote one of the respondent's "Memorandum". Those cases are summarized in the Ap-

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4. 272 F.2d 895, 898.

5. 205 F.2d 371.

pendix to this brief; and as indicated in the summary, many of them support petitioner's position.

Finally, in a futile attempt to weaken or eliminate petitioner's point that the decision sought to be reviewed is not in conflict with the decisions of other circuits, in its second footnote, the respondent advances the proposition that the courts below,

> "* * * properly took into account all of the relevant factors arriving at the overall judgment that petitioner's activities amounted to a 'business'."

The courts below *did* treat the single factor of frequency and continuity of sales as sufficient to support their decisions that petitioner's property was held primarily for sale to customers in the ordinary course of trade or business. And this is so for the perfectly obvious reason that none of the other factors was present, as noted in the Tax Court opinion, Tenth Circuit Record at pages 49 and 51; and as noted in the opinion of Court of Appeals, 301 F.2d 423, 426. (Appendix to Petition, page A-3)

In the same footnote, the respondent again attempts to pull its proposition up by its own bootstraps and again dons syllogistic seven league boots by erroneously equating the term "business" standing alone to the statutory standard of:

> "Property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business".

III.

CONCLUSION.

It is therefore very respectfully submitted again that the petition for certiorari should be granted for the following reasons in addition to those which were advanced in the petition:

(a) The respondent has conceded the importance of the question by failure to challenge that point made by petitioner.

(b) The respondent has conceded by failing to deny that the question involved has not been decided by this Court.

(c) The respondent has conceded by failing to deny that the Tenth Circuit Court of Appeals applied erroneous standards in reviewing the judgment of Tax Court.

Having now these unchallenged reasons for granting the writ, in addition to those stated in the original petition for certiorari, it is prayed that the petition be granted and the writ issued; that the judgment be reviewed; and that on review the judgment be reversed.

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